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9 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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11 **STATE OF CALIFORNIA**, by and through
12 **XAVIER BECERRA**, Attorney General, and
the **CALIFORNIA AIR RESOURCES**
13 **BOARD**; and **STATE OF NEW MEXICO**,
by and through **HECTOR BALDERAS**,
Attorney General, **et al.**,

14 Plaintiffs,

15 **v.**

16 **DAVID BERNHARDT**,¹ Acting Secretary of
17 the Interior; **JOSEPH R. BALASH**, Assistant
18 Secretary for Land and Minerals Management,
United States Department of the Interior;
19 **UNITED STATES BUREAU OF LAND**
20 **MANAGEMENT**; and **UNITED STATES**
DEPARTMENT OF THE INTERIOR,

21 Defendants.
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Case No. 4:18-cv-05712-YGR

Consolidated with No. 4:18-cv-05984-YGR

**CITIZEN GROUPS' OPPOSITION TO
FEDERAL DEFENDANTS' MOTION
FOR A STAY OF PROCEEDINGS**

¹ Pursuant to Fed. R. Civ. P. 25(d), Acting Secretary of the Interior David Bernhardt is substituted as a defendant for Ryan Zinke, who resigned effective January 2, 2019.

Plaintiffs Conservation and Tribal Citizen Groups (“Citizen Groups”) respectfully ask the Court to deny the Federal Defendants’ attempt to delay judicial review of the U.S. Bureau of Land Management’s (“BLM”) unlawful final rule, *Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements*, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (“Rescission”). While Citizen Groups appreciate the circumstances in which the federal government attorneys find themselves, the Antideficiency Act, 31 U.S.C. § 1342, does not entitle the Executive Branch to unilaterally stall litigation in which it is a defendant. Both the U.S. Department of Justice (“DOJ”) and U.S. Department of the Interior (“Interior”) have contingency plans that allow employees to work on litigation deadlines. In light of the ongoing waste of taxpayer-owned natural resources and harms to human health and the environment caused by BLM’s unlawful Rescission and BLM’s selective decision to work on other activities to promote energy development despite the lapse in appropriations, Plaintiffs ask that the Court deny Federal Defendants’ request to stay the deadlines in this case.

ARGUMENT

I. The Departments of Justice and the Interior Have Contingency Plans that Permit Them to Respond to Court Orders During the Shutdown.

The Department of Justice has issued a contingency plan for a lapse in appropriations. U.S. Dep’t of Justice, *FY 2019 Contingency Plan* (Jan. 10, 2019) (“DOJ Contingency Plan”).² The Department’s plan instructs attorneys to request that civil cases be postponed until funding is available, but directs that when a court denies the request, “the Government will comply with the court’s order, which would constitute express legal authorization for the activity to continue” within the meaning of the Antideficiency Act. *Id.* at 3; *see also id.* at 7 (“If a court denies a litigator’s request to postpone a case and orders it to continue, the litigation will become an excepted activity that can continue during the lapse.”). Accordingly, as the D.C. Circuit recently held, adhering to a pre-existing court schedule is consistent with the Antideficiency Act. Order, *Kornitzky Grp., LLC v. Elwell*, No. 18-1160, 2019 WL 138710, at *1 (D.C. Cir. Jan. 9, 2019) (Srinivasan, J., concurring).

² Available at <https://www.justice.gov/jmd/page/file/1015676/download>.

1 Similarly, the contingency plan for Interior’s Office of the Solicitor provides that when a stay of
 2 litigation is denied, responsible attorneys will be “directed to report for work during a lapse in
 3 funding to perform such work as is necessary to support the subject litigation” as “part of the
 4 Executive Branch’s constitutional duty to comply with duly issued and binding orders from the
 5 Judicial Branch.” U.S. Dep’t of Interior, Office of the Solicitor, *Contingency Plan* at 2 (Jan. 2019).³

6 In addition, pursuant to the DOJ Contingency Plan, attorneys are mandated to continue
 7 activities “where there is a reasonable likelihood that the safety of human life or the protection of
 8 property would be compromised, in some significant degree, by delay in the performance of the
 9 function in question.” DOJ Contingency Plan at 1. As explained below, this case challenges BLM’s
 10 unlawful Rescission, which allows the loss of public property through the waste of federal and tribal
 11 natural gas and threatens human health and the environment by allowing additional harmful air
 12 pollution. *See infra* pp. 3–4. Department of Justice personnel may therefore continue to work on this
 13 case despite the prolonged partial shutdown. *See* Minute Order, *O.A. v. Trump*, No 1:18-cv-02718-
 14 RDM (D.D.C. Dec. 27, 2018) (“[W]here there is ‘some reasonable and articulable connection
 15 between the function to be performed and the safety of human life or the protection of property,’
 16 government functions may continue.” (quoting 42 Op. Att’y Gen. 293 (Jan. 16, 1981))).

17 DOJ’s own Contingency Plan shows that, contrary to Federal Defendants’ assertion, DOJ
 18 attorneys are not “prohibited by law from working on Defendants’ letter brief and preparing for the
 19 status conference,” Defs.’ Mot. for a Stay of Proceedings in Light of Lapse of Appropriations 3 (Jan.
 20 23, 2019), ECF No. 82 (“BLM Mot.”), but rather are authorized to respond to court orders. Indeed,
 21 45% of all Environment and Natural Resources Division staff have been exempted from furlough,
 22 and remain available to conduct litigation. DOJ Contingency Plan at 12, Tbl. 2. Accordingly, if this
 23 Court denies Federal Defendants’ request for a continuance, Federal Defendants and their counsel,
 24 by statute and through their contingency plans, would be legally authorized and mandated to
 25 continue litigation and all related activities, including all actions required to meet this Court’s
 26 upcoming deadlines for filing letter briefs and lodging the administrative record.

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 28 ³ Available at <https://www.doi.gov/sites/doi.gov/files/2019-01-sol-contingency-plan.pdf>.

II. BLM Should Not Be Permitted to Unilaterally and Indefinitely Delay a Case Challenging Its Unlawful Rescission of Critical Protections.

The Rescission allows the waste of billions of cubic feet of publicly and tribally owned natural gas. This is public property whose waste costs taxpayers millions in lost royalties. 83 Fed. Reg. at 49,205. At the same time, each year the Rescission is in place, it threatens human health by allowing the emissions of hundreds of thousands of tons of dangerous pollutants, including the powerful climate-forcer methane, smog-forming volatile organic compounds, and cancer-causing hazardous air pollutants. BLM, *Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule* 47–48 (Aug. 31, 2018).⁴ Americans living on and near public and tribal lands with oil and gas development, including numerous Citizen Group members, continue to be exposed to emissions of these dangerous air pollutants. These harms are ongoing; they do not stop because of the lapse in appropriations. Given these ongoing harms, this Court should not allow the government to delay resolution of Citizen Groups’ challenge to the unlawful Rescission indefinitely. *See* Order Denying Mot. to Stay 3, *Klamath-Siskiyou Wildlands Ctr. v. Grantham*, No. 2:18-cv-02785-TLN-DMC (E.D. Cal. Jan. 4, 2019), ECF No. 43 (denying shutdown-related stay motion because “to extend the time Plaintiff waits for resolution, while continuing the [ongoing logging] Project at issue” would not be appropriate).

Nor should the Court allow BLM to continue to authorize select employees to work only to serve its energy development agenda. BLM claims that its employees cannot work on compiling the administrative record for the Rescission because “employees of the Defendant agencies are prohibited from working, even on a voluntary basis, except in very limited circumstances, including ‘emergencies involving the safety of human life or the protection of property.’” BLM Mot. at 2 (quoting 31 U.S.C. § 1342). Yet, BLM and Department of the Interior staff have continued to work to authorize other energy-related activities during the shutdown. For example, BLM’s shutdown contingency plan allows staff to continue working on “selected energy, minerals, rights of way, grazing, and associated activities” and allows continued activity to issue permits and leases. BLM,

⁴ Available at <https://www.regulations.gov/document?D=BLM-2018-0001-223607>.

1 *Contingency Plan for Possible Shutdown of Government Functions* 2–3 (Jan. 2019).⁵ This month,
 2 BLM employees across the country were asked to return to work to resume processing applications
 3 for permits to drill and to issue oil and gas leases on public lands.⁶ Elsewhere in Interior, the Bureau
 4 of Ocean Energy Management’s contingency plan permits forty employees to continue work on
 5 “preparing National Outer Continental Shelf (OCS) Program decision documents,” and justifies that
 6 decision by explaining that “[i]n order to comply with the Administration’s America First energy
 7 strategy to develop a new OCS Oil and Gas leasing program, work must continue.” Bureau of Ocean
 8 Energy Mgmt., *FY 2019 Contingency Plan* 2, 4 (Jan. 2019).⁷ This Court should not allow the federal
 9 government to delay the administration of justice here while moving forward with other energy-
 10 related activities, some of which will exacerbate the very problems this litigation seeks to address.

11 Particularly “where, as here, there is a reasonable and articulable connection between the
 12 function to be performed and the safety of human life or the protection of property, government
 13 functions may continue.” Order at 1, *Waterkeeper All., Inc. v. Wheeler*, Civ. No. 18-2230 (JDB)
 14 (D.D.C. Jan. 14, 2019), ECF No. 31 (denying stay in case challenging EPA program authorizing
 15 permits for coal ash disposal) (quotations omitted); Order at 1, *New York v. U.S. Dep’t of Labor*,
 16 Civ. No. 18-1747 (JDB) (D.D.C. Dec. 28, 2018), ECF No. 71 (similar).

17 **III. Courts Throughout the Nation Have Rejected Similar Requests.**

18 As the cases cited above demonstrate, courts nationwide have rejected similar bids by the
 19 federal government to unilaterally stall cases in which it is a litigant. *See In re Pet’n for a Gen.*
 20 *Order Holding Civil Matters in Abeyance*, Misc. No. 2:18-mc-00196 (S.D. W. Va. Jan. 2, 2019),
 21 ECF No. 3 (“[T]he government should not be given special influence or accommodation in cases
 22 where such special considerations are unavailable to other litigants.”). Indeed, the Ninth Circuit has
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24 ⁵ Available at <https://www.doi.gov/sites/doi.gov/files/2019-01-blm-contingency-plan.pdf>.

25 ⁶ See, e.g., Kevin Robinson-Avila, *BLM continuing oil work in NM, despite shutdown*, Albuquerque
 26 J. (Jan. 18, 2019), [https://www.abqjournal.com/1270281/blm-continuing-oil-work-in-nm-despite-](https://www.abqjournal.com/1270281/blm-continuing-oil-work-in-nm-despite-shutdown.html)
 27 *shutdown.html*; Heather Richards, *Limited federal workers return to work on Wyoming energy*
 28 *projects during shutdown*, Casper Star Trib. (Jan. 11, 2019), [https://trib.com/business/energy/](https://trib.com/business/energy/limited-federal-workers-return-to-work-on-wyoming-energy-projects/article_9195220d-790f-5e11-ae51-55438b128573.html)
[limited-federal-workers-return-to-work-on-wyoming-energy-projects/article_9195220d-790f-5e11-](https://trib.com/business/energy/limited-federal-workers-return-to-work-on-wyoming-energy-projects/article_9195220d-790f-5e11-ae51-55438b128573.html)
[ae51-55438b128573.html](https://trib.com/business/energy/limited-federal-workers-return-to-work-on-wyoming-energy-projects/article_9195220d-790f-5e11-ae51-55438b128573.html).

⁷ Available at <https://www.doi.gov/sites/doi.gov/files/2019-1-boem-contingency-plan.pdf>.

1 stated as a blanket matter that “[a]ll deadlines for court filings remain as scheduled” during the
 2 shutdown. U.S. Ct. of App. for the Ninth Cir., *Announcements* (Jan. 10, 2019);⁸ *see also* Order at 1,
 3 *WildEarth Guardians v. Provencio*, No. 17-17373 (9th Cir. Jan. 22, 2019), ECF No. 64 (denying
 4 motion to postpone oral argument); Order at 1, *Juliana v. United States*, No. 18-36082 (9th Cir. Jan.
 5 7, 2019), ECF No. 10 (in case regarding harms from climate change, granting motion to expedite,
 6 and denying the Federal Defendants’ request to postpone case due to the lapse in appropriations).

7 The D.C. Circuit—which adjudicates a significant number of cases in which the federal
 8 government is a litigant—likewise has a practice of denying such motions. *See, e.g.*, Order at 1,
 9 *Maryland v. EPA*, No. 18-1285 (D.C. Cir. Jan. 18, 2019), Doc. No. 1769243 (denying motion to
 10 hold case in abeyance due to lapse in appropriations and ordering EPA to propose a briefing
 11 schedule).⁹ Other examples abound, including cases in this court, and including cases in which the
 12 other parties consented to the request. *See, e.g.*, Minute Order, *California v. EPA*, No. 4:18-cv-
 13 03237-HSG (N.D. Cal. Jan. 17, 2019), ECF No. 84 (denying request to continue briefing schedule
 14 and hearing date in light of the lapse in appropriations).¹⁰

15 CONCLUSION

16 For the foregoing reasons, Citizen Groups respectfully request that the Court deny Federal
 17 Defendants’ motion for a stay in proceedings in light of the lapse in appropriations.

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 19 ⁸ Available at https://www.ca9.uscourts.gov/content/view.php?pk_id=00000000969.

20 ⁹ *See also* Order at 1, *Idaho Conservation League v. Wheeler*, No. 18-1141 (D.C. Cir. Jan. 16, 2019),
 21 Doc. No. 1768673 (denying joint motion for extension of time); *Air Transp. Ass’n of Am., Inc. v.*
 22 *Fed. Aviation Admin.*, No. 18-1157, 2019 WL 190254, at *1 (D.C. Cir. Jan. 15, 2019) (denying
 23 motion to briefing schedule); *People for the Ethical Treatment of Animals v. U.S. Dept. of Agric.*,
 24 No. 18-5074, 2019 WL 180582, at *1 (D.C. Cir. Jan. 14, 2019) (denying motion to stay oral
 25 argument); Order at 1, *Leader Commc’ns, Inc. v Fed. Aviation Admin.*, No. 18-1147 (D.C. Cir. Jan.
 26 7, 2019), Doc. No. 1767294 (denying motion to stay briefing).

27 ¹⁰ *See also* Order at 1, *W. Org. of Res. Councils v. Bernhardt*, No. 9:18-cv-00139-DWM (D. Mont.
 28 Jan. 11, 2019), ECF No. 37 (denying request to stay the case); Order Denying U.S.’ Mot. for a Stay
 at 1, *United States v. S. Fla. Water Mgmt. Dist.*, No. 1:88-cv-01886-FAM (S.D. Fla. Jan. 4, 2019),
 ECF No. 2472 (denying motion to stay pending deadlines); Order at 1–2, *Colon-Morciglio v. United*
States, No. 3:17-cv-02312-WGY (D.P.R. Jan. 2, 2019), ECF No. 20 (denying motion for stay and
 analogizing to a corporate litigant deciding not to pay its attorneys and then seeking a stay); Minute
 Order, *Corsi v. Mueller*, No. 1:18-cv-02885-ESH (D.D.C. Dec. 27, 2018) (denying motion to stay an
 upcoming hearing); Order Denying Mot. to Stay Pretrial Deadlines at 3, *California v. Ross*, No.
 3:18-cv-01865-RS (N.D. Cal. Dec. 26, 2018), ECF No. 122 (similar).

1 Respectfully submitted this 24th day of January, 2019,

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